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INTERNATIONAL COUNTERTRADE

Draft chapters of legal guide on drawing up contracts in international countertrade transactions*

Report of the Secretary-General

Addendum

X. RESTRICTIONS ON RESALE OF COUNTERTRADE GOODS

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* The text contained herein is a first draft prepared by the Secretariat for consideration by the Working Group on International Payments as part of the preparatory work on the draft legal guide on drawing up contracts in international countertrade transactions and should not be regarded as stating the views of the Working Group.

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A. General remarks

1. Sometimes the parties agree in the countertrade agreement or in a supply contract to restrictions on the resale of all or of a portion of the goods purchased pursuant to the countertrade commitment. The agreed restrictions may, for example, limit the territory where the purchaser may resell goods, set a minimum resale price, or prescribe packaging and marking of goods to be resold. Such restrictions may be applied to the resale of the goods within the country of the purchaser or to the re-export of the goods. A countertrade agreement or supply contract may contain a combination of different types of resale restrictions.

2. Resale restrictions of this type are not particular to countertrade transactions. However, such restrictions are dealt with in the legal guide because they may take on a special importance in countertrade. Resale restrictions may be part of the strategy of a supplier of countertrade goods or of a government that has mandated countertrade when the purpose of requiring the countertrade commitment was to increase the volume of exports to a particular market or to develop new markets for the goods without affecting adversely existing markets for those goods.

3. The parties should be aware that many legal systems contain mandatory rules on restrictive business practices, and the parties should ensure that a resale restriction they contemplate using is not in contravention of those rules. Such mandatory rules may be set forth in a statute, and in various types of administrative regulations. The mandatory rules of more than one country may apply. Mandatory rules of this type may contain generally worded prohibitions against practices that unduly restrain competition and thereby put competitors or consumers at an unfair disadvantage or harm the national economy. Furthermore, there often exist specific prohibitions against particular types of restrictive business practices. For example, many legal systems provide that agreements restricting the right of resale are prohibited or may be invalidated if the supplier imposing the restriction has a dominant market position, if the restriction has the effect of limiting access to markets or otherwise unduly restraining competition or if the restriction has or may have other adverse effects on trade or economic development. Agreements setting a minimum price are prohibited outright in some legal systems. In other legal systems, minimum price agreements may be permitted only for certain types of goods (e.g., brand-name or luxury goods) or if specified conditions are met (e.g., the price-setting agreement is approved by the competent authority or it is shown that buyers have sufficient possibility to obtain the same or similar goods at prices not subject to a price-setting agreement).

4. In negotiating a restriction on the resale of countertrade goods the parties should be aware that such a restriction may lower the price that the countertrade party purchasing and reselling countertrade goods will be able to offer to the countertrade party supplying the goods. Such is likely to be the effect of a clause prohibiting the resale of the goods in the most attractive market, or of a clause requiring resale terms that result in additional costs to the party reselling the goods.

5. When a resale restriction is contemplated, it is advisable to be as specific as possible in the countertrade agreement as to the content of the restriction. Absent a provision in the countertrade agreement on resale

restrictions, a demand that the purchase of countertrade goods be subject to a resale restriction may complicate negotiation of a supply contract and may make it difficult to attribute to one of the parties responsibility for a failure to conclude a supply contract. When it is possible that a third party will be engaged to make the purchases necessary to fulfil the countertrade commitment, the supplier may wish to ensure that the third party is aware that the purchases made by the third party will be subject to that restriction (see below, paragraphs 22 and 23).

6. The degree to which the countertrade agreement can be specific depends on factors such as whether the type of goods to be purchased has been identified, the nature of the restriction, or the length of time during which the supply contracts will be concluded, and the possibility of third parties being involved in the resale of the goods. In some cases it may be possible to formulate in the countertrade agreement the resale restriction clause that would apply to all purchases made pursuant to the countertrade agreement. In other cases the supplier may not have the necessary information at the time of the conclusion of the countertrade agreement to determine whether a resale restriction would be desirable, but would not wish to be precluded from raising the question of resale restrictions at a later stage. In such cases, the countertrade agreement may identify only the type or commercial purpose of a resale restriction being contemplated. For example, it may be agreed that the parties would negotiate a limitation of the territories in which the purchaser is permitted to resell goods in order to avoid sales of the goods in the supplier's existing markets.

7. In some exceptional circumstances, the countertrade agreement may contain a stipulation that the purchaser may only use the goods in-house and may not resell them. Such a restriction may be imposed, for example, when the goods are supplied on preferential terms (e.g., in order to help the purchaser in a hardship situation) or when the supplier is under an obligation to restrict distribution of the goods because of their particularly sensitive nature or when the resale of the goods would entail disclosure of information that the supplier wishes to keep under its control.

B. Duty to inform or consult

8. The countertrade agreement may provide that the party purchasing goods under the countertrade agreement is to inform the supplier as to certain aspects of the resale of the goods, such as the territory of resale, resale price, or packaging or marking of the goods. Information of this kind may be useful to the supplier in monitoring compliance with resale restrictions binding upon the purchaser, in determining whether resale of the goods by the purchaser is achieving the goal of introducing the goods into new markets, in deciding whether to continue to offer those goods in countertrade transactions, in deciding whether the goal of opening new markets or the goal of increasing sales in traditional markets would be served by engaging in further countertrade transactions with the purchaser, or in planning its own marketing or production of the same or similar type of goods. Such an obligation to inform may be agreed upon also when the parties do not agree on a specific resale restriction because the type of goods to be purchased has not been specified at the time of the conclusion of the countertrade agreement.

9. The countertrade agreement should be clear as to whether an obligation to inform or consult is limited to giving information or is intended to provide an opportunity for consultations between the purchaser and the supplier prior to the resale. It is advisable to stipulate the point of time when the supplier is to be informed. If the parties intend to allow for consultations prior to resale, it should be made clear that the purchaser must inform the supplier in sufficient time to allow consultations to take place.

C. Territorial and related restrictions

10. The parties to a countertrade transaction sometimes agree on restrictions as to the territory where the party purchasing goods under the countertrade agreement may resell the goods. A territorial restriction may be based on the supplier's desire, for example, to generate sales in new markets, to protect the supplier's existing markets, to ensure that the goods comply with the rules applicable in the markets in which they are to be resold, or to avoid violating restrictions arising from patents held by third persons or from licensing arrangements between third persons and the supplier for technology used to produce the countertrade goods. A further reason may be to prevent interference with exclusive distributorships granted by the party supplying goods under the countertrade agreement. If the supplier has granted an exclusive distributorship in a particular territory, it is inherent in such an arrangement that the supplier would be under a duty not to enter into contractual arrangements that undermine the exclusive distributorship. Sometimes exclusive distributorship agreements provide that the exclusive distributor is entitled to a commission if goods in question are sold in the restricted territory. In such cases the parties to the countertrade agreement might require the purchaser to pay a commission to the exclusive distributor.

11. Identification of the territories where the goods may be resold can be done either by specifying the territories where the goods are not permitted to be resold or by specifying those territories where the goods are permitted to be resold. A provision specifying territories where the goods may be resold should make clear that resale is prohibited in territories that are not listed. The parties should pay attention to the need to use precise terminology. General expressions such as "Caribbean States", "Latin America", "Pacific region", or "Western Europe" may be interpreted differently and therefore may be inadequate. The territory in which the goods are permitted to be resold may also be limited to those territories in which after-sale service is available either from the purchaser or some other source. In drafting clauses concerning territories of resale, the parties should bear in mind that the right to resell in particular territories is distinct from the question whether the right to resell in those territories is exclusive or non-exclusive.

12. In some cases, the countertrade agreement may provide that only a specified quantity of goods is permitted to be resold in particular territories or that only a specified quantity of goods is permitted to be resold without restriction as to territory. Such an approach may be motivated, for example, by the existence of governmental import quotas, by a desire to avoid oversupply in existing markets or by a desire to introduce the goods into new markets.

13. When the countertrade transaction is likely to result in the resale of goods in markets in which the supplier usually does not sell, the supplier may

wish to permit the resale of the goods only in territories in which the goods are covered by product liability insurance for claims arising from personal injury or property damage caused by the goods. It may be agreed that the party purchasing the goods under the countertrade agreement and reselling them is to obtain the insurance. Such insurance may be in the interest of the supplier because claims for damage resulting from the use of the goods may be made against the supplier. A clause permitting the resale of the goods only in territories in which the goods are covered by product liability insurance may be considered in particular when the products purchased under the countertrade transaction are to be resold in a market where the standard of liability or the level of compensation awarded under product liability laws is considerably higher than in the markets in which the products are traditionally sold.

14. Suppliers sometimes prohibit purchasers from selling to particular customers or classes of customers. Such restrictions may be motivated by a desire on the part of the supplier to retain certain customers for itself (e.g., bulk buyers). An aim of this type of restriction may be to prevent competition in the supply of the goods that might result in a lowering of the price. It should be noted that such resale restrictions may violate mandatory rules mentioned in paragraph 3, above, prohibiting certain types of restrictive business practices. Another possible motivation for such restrictions may be the prevention of resale of goods of a sensitive or hazardous nature to certain buyers.

15. The parties sometimes agree that the resale of goods requires the consent of the supplier. This approach might be taken, for example, when the nature of the goods requires a restriction on their transfer (e.g., hazardous substances or equipment whose use requires special training) or when the supplier contemplates granting exclusive distribution rights in the future and therefore wishes to retain the right to restrict the resale of the goods by the purchaser once those distributorships have been granted. The requirement of consent may be limited to specified territories or to specified classes of customers. The exercise by the supplier of the right to withhold consent may be made subject to objective criteria. It may be agreed, for example, that consent may be withheld only where the goods are to be resold in a market in which an exclusive distributorship has been established, or where existing sales of the goods in question by the supplier or its distributors have reached a specified threshold.

D. Resale price

16. Sometimes countertrade agreements contain provisions concerning the minimum resale price of the goods. As pointed out in paragraph 3 above, the parties should bear in mind that in many States, under mandatory rules relating to restrictive business practices, setting a minimum resale price is permitted only in limited circumstances.

17. The supplier may wish to set a minimum resale price when the goods to be supplied pursuant to the countertrade agreement are of such a quantity that their resale might destabilize or depress the price for goods of that type. While in many countertrade transactions the quantities of goods involved are such that they would not adversely affect the market price, there are countertrade transactions that result in an abrupt and large increase in the

supply of goods of a particular type and that may therefore cause price instability. Minimum resale prices may also be intended to prevent sales at discount prices that might harm the image of a product.

18. A minimum resale price may be stipulated in the countertrade agreement or it may be agreed that a minimum resale price is to be set at a time subsequent to the conclusion of the countertrade agreement (e.g., at the time of the conclusion of the supply contract or after a specified volume of the goods have been resold). In the case of a long term countertrade transaction, the parties may agree that a minimum resale price is to be set periodically. The countertrade agreement should be clear as to the charges and costs that are to form part of the stipulated minimum resale price (e.g., transportation costs, insurance premiums, or taxes). If the minimum price is to be set subsequent to the conclusion of the countertrade agreement, the parties may wish to link the determination of the minimum to an objective standard of the type used in setting a price for the goods as between the parties to the countertrade agreement. Such standards include the price quoted in a market of goods of the type in question, competitor's price or the price charged to the supplier's most favoured customer (see chapter VI, "Pricing of goods", paragraphs 11 to 20).

19. The parties may not wish to set a specific minimum resale price in the countertrade agreement when the goods are of a standardized quality, such as commodities, that are sold in public markets because of the possibility that the market price may fall below a specific minimum resale price set in the countertrade agreement. A purchaser bound by a minimum resale price higher than the market price would find it difficult or impossible to resell the goods. In order to avoid such difficulties, the parties may wish to provide that the minimum resale price is to trace movements in the market price for the goods in question. This could be done by linking the determination of the minimum price to objective standards of the type referred to in the preceding paragraph.

E. Packaging and marking

20. The countertrade agreement may contain requirements as to the type of packaging or marking to be used in reselling the goods. Such requirements may obligate the purchaser to repackage or re-mark the goods or to resell the goods with their original packaging or marking. The question of packaging and marking may be important because a goal of many countertrade transactions is to introduce goods in non-traditional markets. The packaging and marking of the goods may be intended to affect the marketability of the goods in those markets, or to comply with legal rules governing packaging and marking. For example, the countertrade agreement may require that the goods be sold under the supplier's trade name, that the goods be sold in a particular form of packaging, that the packaging list the ingredients and composition of the goods, that the packaging indicate the origin of the goods, or that packaging include instructions for use and that the instructions be in a particular form.

21. The parties should ensure that any packaging or marking requirements in the countertrade agreement do not conflict with legal rules applicable where the goods are to be resold. Even when the countertrade agreement does not prescribe repackaging or re-marking, the purchaser may have to repackage

or re-mark the goods when packaging and marking of the goods by the supplier do not conform to the rules applicable in the country where the goods are to be resold.

F. Application to third-party purchasers

22. When it is possible that the party committed to purchase goods will engage a third party to make the purchases, the supplier may be interested in seeing that a resale restriction stipulated in the countertrade agreement will be observed by the third party. For that purpose, the supplier may wish to include in the countertrade agreement a provision obligating the party originally committed to purchase goods to incorporate the resale restriction in the contract through which the party originally committed engages the third party. Furthermore, it is advisable that the supplier include that resale restriction in the supply contract concluded with the third party or in the agreement with the third party by which the third party makes a commitment to the supplier to conclude a future supply contract (see chapter VIII, "Participation of third parties", paragraphs 15 and 16). In this way the third party would be responsible directly to the supplier for compliance with the resale restriction.

23. As noted in chapter VIII, "Participation of third parties", paragraph 25, the party originally committed to purchase may be liable under the countertrade agreement for a resale of the goods by the third party in violation of a restriction set out in the countertrade agreement. Therefore, the party originally committed would itself have an interest in reflecting in the contract with the third party any resale restriction set out in the countertrade agreement. Furthermore, the party originally committed to purchase goods may wish to include in its contract with the third party a "hold-harmless" clause committing the third party to indemnify the party originally committed to purchase for any liability to the supplier resulting from a violation by the third party of a resale restriction (for a discussion of "hold-harmless" clauses, see chapter VIII, paragraph 33).

G. Review of restrictions

24. Large-scale countertrade transactions often involve purchase and resale of goods over a long period of time during which the underlying commercial circumstances and interests of the parties may change significantly. The possibility of such changes may make it appropriate to provide in the countertrade agreement for a review of agreed upon resale restrictions. A periodic review or a review upon the request of a party may be agreed upon. When the review is to be upon the request of a party, the countertrade agreement may identify the types of changes in the underlying circumstances that would entitle a party to a review.

25. The extent to which a review procedure is advisable would depend upon the nature of the resale restriction in question. For example, a restriction as to the territory or price of resale linked to a particular type of goods may entail a greater need for possible future modification than a restriction of a less stringent sort such as a requirement that the purchaser consult with the supplier prior to reselling the goods.